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ABSTRACT

In order to determine the evidence upon which the Federal Trade Commission decides that an advertisement or other sales representation has the capacity or tendency to deceive, a census was conducted of the 3,337 cases in which such decisions have been made from 1916 through 1973. Findings showed that, of 22 categories of evidence, the three most frequently used categories were from the internal-commission evidence category--87.2% of the decisions used evidence from that category only. Data also show trends toward using evidence from outside sources; consumer testimony and surveys have been relied upon in more than half of the cases in the 1970s. (JM)

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The Federal Trade Commission's Use of Evidence to Determine Deception

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The Federal Trade Commission's Use of Evidence to Determine Deception

FTC's reliance on its own "expertise" is still prominent, but use of evidence gathered directly from consumers is gaining rapidly

Upon what evidence does the Federal Trade Commission decide that an advertisement or other sales representation has the capacity or tendency to deceive? This article reports a study which answers that question in the only conclusive (yet not previously done) way: by conducting a census of the 3,337 cases in which such decisions have been made from the FTC's beginnings to the present day (through 1973).

The study[1] reveals that the conventional wisdom about the Commission's habits, while accurate as a generalization across the entire 58-year period, is lacking in precision and is sparse in detail about the actually wide variety of categories of evidence employed. Furthermore, the conventional wisdom is essentially misleading with respect to the FTC's use of evidence in the 1970s, which has shown a considerable qualitative change.

Observations on the type of evidence used by the FTC turn

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1. Based on an unpublished M.A. thesis by the first author, "The Federal Trade Commission's Use of Evidence to Determine Deception," School of Journalism and Mass Communication, University of Wisconsin-Madison (1975), directed by the second author.

generally to what may be called the "internal-external" issue. Does the Commission stay "internal," concentrating on its own intuitive understanding of the presence of deception in the message? Or does it go "external," concentrating for example on testimony obtained directly from consumer witnesses? Since deception is clearly a behavioral event occurring within the consumer's mind, the crux of the issue is that "internal" evidence is no evidence at all to behaviorally oriented marketing people. The FTC therefore is likely to be held in low esteem and to be subjected to calls for reform by such people if it should be found to be concentrating on an "internal" approach.

And that is the finding which the conventional wisdom makes. The legal journals have established the viewpoint through statements such as Millstein's that "generally the Commission will find that an advertisement promises what the Commission itself believes it promises."[2] Gellhorn scornfully describes "the 'evidence,' or more accurately, the lack of evidence supporting FTC findings of consumer understanding."[3] LaRue observes that "Congress intended the Federal Trade Commission to be a body of experts,"[4] and that the FTC Act therefore provided that the Commission's findings of fact, if supported by

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2. Ira M. Millstein, "The Federal Trade Commission and False Advertising," Columbia Law Review, Vol. 64 (1964), pp. 439-499, at p. 470.

3. Ernest Gellhorn, "Proof of Consumer Deception Before the Federal Trade Commission," Kansas Law Review, Vol. 17 (June 1969), pp. 559-572, at p. 564.

4. Paul H. LaRue, "FTC Expertise: A Legend Examined," The Antitrust Bulletin, Vol. 16 (Spring 1971), pp. 1-31, at p. 9.

evidence, shall be conclusive.[5] When asked to rule on whether supporting evidence indeed exists, the courts of appeal have adopted the habit of checking only on its existence and rarely questioning its type or quality. This omission LaRue rues because it results in "cases in which the presumption of evidence has saved the day for insufficiently supported Commission findings."[6]

The courts have also established that the commissioners have the explicit right to rely solely on their own intuitive understanding about deception, which means that they need not consider testimony from consumers.[7] The thrust of LaRue's article, however, is that the presumption of Commission expertise is invalid and that judicial deference to it by the appellate courts should stop.

The viewpoint of the legal writers has been adopted more recently by marketing and consumer researchers. Gardner states that "there has been little concern for incorporating the consumer into any understanding of deception in advertising,"[8] and he adds that the FTC and FDA have no research procedures but only legal procedures and that they therefore "operate on the basis of 'fireside' inductions."[9] Jacoby and Small state that "the FTC has relied on three types of evidence as

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5. Same reference as footnote 4, p. 10. FTC Act, Sec. 5, amended, 15 U.S.C. 45 (1964).

6. Same reference as footnote 4, p. 31.

7. Zenith Radio v. FTC, 143 F.2d 29, 31 (7th Cir., 1944); Doris Savitch v. FTC, 218 F.2d 817, 818 (2nd Cir., 1955).

8. David M. Gardner, "Deception in Advertising: A Conceptual Approach," Journal of Marketing, Vol. 39 (January 1975), pp. 40-46, at p. 41.

9. Same reference as footnote 8, p. 46.

a substitute for actual consumer data." Citing Gellhorn as source, they identify the types as the commissioners' own intuitive expertise, dictionary definitions, and testimony from outside experts.[10]

Need for Categories of Evidence

These many observations notwithstanding, the various categories of evidence used by the FTC have never been identified comprehensively, nor have their proportions of use been stated precisely. Further, no changes in the use of various types of evidence across the years have been identified, despite the suggestion derivable from casual observation that Commission reliance on consumer testimony and surveys has appeared to increase considerably in the 1970s.

The present study was designed therefore to give the most complete report possible of FTC usage of the various types of evidence.

Data Collection Procedures

The entire set of decisions recorded in all published volumes of FTC Decisions was examined (1974 and beyond not available at this writing). The 3,337 cases were analyzed in which the Commission made a formal finding that a sales representation (of any sort, not just advertising) was or was not deceptive. Nearly all cases involved were adjudicated proceedings consisting of the issuance of a complaint, finding of facts, and resulting cease and desist order (in 3,312 cases) or dismissal (in 119 cases). In the 1940s numerous orders labeled as "consent orders" were found to have the formal characteristics of cease and

10. Jacob Jacoby and Constance B. Small, "Deceptive and Misleading Advertising: The Contrasting Approaches of the FTC and the FDA," Purdue Papers in Consumer Psychology, No. 146, mimeo (1975), p. 2. See also: Jacoby and Small, "The FDA Approach to Defining Misleading Advertising, Journal of Marketing, Vol. 39 (October 1975), pp. 65-73.

desist orders and were treated as such. The genuine consent orders generally were not included; they involved no formal hearing and presentation of evidence. However, 36 consent orders in 1954-56 included formal findings of deception and so were included.

The type or types of evidence cited in each decision were recorded under the categories described below. A category was recorded only once for each decision, even when more than one application of it appeared. Evidence cited in dismissals as showing the absence of deception was recorded. Evidence cited but described as rejected (often for reasons of bias) was not recorded.

Where both commissioners and administrative law judge (hearing examiner, in earlier years) recorded findings and/or opinion, or when an appeals court affirmed the FTC's order, the total writing was considered as one decision. Types of evidence mentioned by the law judge were recorded unless the evidence or the whole initial decision was rejected by the commissioners. Recent cases in which the initial decision was not yet acted upon by the commissioners were not included. Where a remand or reversal by an appeals court was based upon rejection of certain categories of evidence, the existence of the categories was excised from the data. If remand or reversal was jurisdictional or procedural, the recording of the categories was retained.

Sometimes the Commission recorded a decision for a particular complaint and then filed memoranda decisions pertaining to a number of similar but separate complaints. The memoranda decisions stated no separate findings nor opinion, so were not recorded. Similarly, decisions involving multiple companies but having only one set of findings and opinion were recorded only once.

What was categorized in all cases was evidence cited of a represen-

tation's deception or deceptive capacity. FTC cases also cited evidence of a representation's falsity. Since falsity is conceptually distinct from deception, evidence of it was not recorded.

The Categories of Evidence of Deception

Preliminary selection of categories was made from the literature.[11] However, final determination was made directly from the primary records, enabling identification of a more complete set of categories than was previously described.

The first step was to select some natural groupings of categories. The first was called Internal Commission Evidence. Some writers have scorned internal evidence as no evidence at all,[12] but it is called that here because it is offered in case records as evidence and because the law has sanctioned it as such.

The remaining groups constitute three varieties of external evidence, using sources beyond the Commission's own perception of the case at hand. Group II is Precedential Evidence, in which previous decisions by FTC or courts about similiar situations are cited as showing deception.

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11. Same references as footnotes 2 and 3; Gary L. Gerlach, "The Consumer's Mind: A Preliminary Inquiry into the Emerging Problems of Consumer Evidence and the Law," Marketing Science Institute (December 1972); Gary M. Armstrong and Frederick A. Russ, "Detecting Deception in Advertising," MSU Business Topics (Spring 1975); Richard W. Pollay, "Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform," Kansas Law Review, Vol. 17 (June 1969), pp. 625-637.

12. Same references as footnotes 3 and 4; Gerlach, same reference as footnote 11; Ivan L. Preston, The Great American Blow-Up: Puffery in Advertising and Selling (Madison: University of Wisconsin Press, 1975), p. 147.

While such precedents are external to the case at hand, some were decided on the basis of Group I evidence and so would be regarded by some observers as essentially "internal." Other precedents, of course, were decided on the basis of evidence which was truly "external." The truly external groupings of evidence include Group III, External Non-Consumer Evidence, and Group IV, External Consumer Evidence.

Group I

Six categories of Internal Commission Evidence, Group I, were identified:

Category 1: Deception Per Se. The decision recorded the representation as deceptive or not deceptive with no further comment. This was the purest category of evidence which was no evidence at all.

Category 2: Falsity Equals Deception. The representation was found to be false, and the conclusion that it was deceptive followed without explanation. This was taken to imply a Commission belief that falsity amounted to deception in the given case.

Category 3: Official Notice. The Commission waived proof of certain facts on the ground that they were obvious because they were agreed to by both sides or because they were similar to facts in previous cases. It explicitly stated that these facts indicated deception.

Category 4: Citation of Commission Expertise. The Commission's own expertise was cited as capable of determining deception. While not effectively different from Category 1, this category involved the Commission's attention to the notion that a source should be cited; thus it cited itself.

Category 5: Consumer Understanding/Consumer Preference. The Commission declared that the consumer understood a representation in a certain way or had a preference for a particular product, such understand-

ing or preference resulting in deception. While this implied the existence of an external source, none was identified.

Category 6: Representation Itself. The Commission stated it was relying upon the advertisement or other representation itself as evidence of its deceptiveness.

Group II

Under Group II, Precedential Evidence, the numbering of categories is continued consecutively:

Category 7: Commission Precedents.

Category 8: Court Precedents. These included the U.S. Courts of Appeals and the Supreme Court.

Group III

Group III, External Non-Consumer Evidence, included:

Category 9: Dictionary Definitions. Including encyclopedias and other similar references, this category's usage involved the assumption that the consumer understood the words or phrases to mean what the source stated they meant.

Category 10: Trade Definitions. A trade or industry may have its own definitions of product composition or of what a word or phrase means in the trade. Again, the FTC assumed that the consumer must have understood the meaning in the same way.

Category 11: Trade Understanding of Consumer Perception. A trade or industry may have determined how it believed the consumer would perceive or understand words, phrases, or representations.

Category 12: Trade Testimony. This was testimony given by a person in the respondent's industry, not in the employ or former employ of respondent. He was not qualified as an expert in the industry but simply as a representative of it.

Category 13: Expert Testimony. This was testimony from a recognized expert in respondent's industry or in a relevant field such as marketing, advertising, or psychology. Testimony was categorized as expert only when the Commission cited it as such or when it cited the person's qualifications beyond a simple explanation of his employment.

Category 14: Respondent Testimony. This was testimony (or other response, such as an answer to the complaint) by respondent or his agents or former employees.

Category 15: Unidentified or Miscellaneous Testimony. The testifier was not identified in the record, or did not fit into any of the other testimony categories.

Category 16: Other Federal Agencies. This consisted of a ruling or finding by another agency that a representation was deceptive.

Category 17: Documentary Evidence. This included letters, contracts, or additional materials not categorized elsewhere.

Category 18: Actual Deception. Instances of actual deception were cited, and the Commission held them to imply deception or deceptive capacity for other persons as well.

Group IV

Group IV, External Consumer Evidence, included:

Category 19: Consumer Testimony. This was testimony by members of the public to whom the representation was made or by members of the public at large.

Category 20: Respondent Surveys. These were surveys of consumers conducted by or commissioned by the respondent.

Category 21: Commission Surveys. These were surveys of consumers conducted by or commissioned by the FTC.

Category 22: Unidentified Surveys. These were surveys of consum-

ers whose source was not identified.

Findings

The FTC's 3,337 determinations about deception averaged 57.5 decisions annually for the 58-year period, ranging from 239 in 1939 to just one in 1917.

Table 1 records the frequencies and proportionate use of each of the 22 categories of evidence, from most to least frequent. There were 4,536 uses of types of evidence recorded, an average of 1.36 per decision.

The three most used categories were all from Group I, Internal Commission Evidence, and one or more of the Group I categories appeared in 94.7% of the decisions. There were 2,910 (87.2%) which used evidence from one or more Group I categories only, further indicating how preponderant was the reliance on such evidence. Surprising, however, in view of the literature cited earlier, was the weak usage of Category 4, involving the Commission's citation of its own expertise. All of the other Group I categories, however, involved the Commission's invoking of its own expertise---although without so stating. This was done most often by far by using Category 2, involving the theoretically questionable practice of seeing deception follow automatically from falsity.

With the dominance of Group I, only 427 decisions (12.8%) utilized any of the other three groups of evidence, and of these only 349 (10.5%) used one or both of Groups III or IV. The most used single category beyond Group I appeared in only 5.8% of the decisions.

Trend Over Years

Space does not permit tabulation of data by individual years.[13] However, Table 2 shows percentages of use for two time periods, 1916-

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13. Available in Brandt, same reference as footnote 1.

Table 1---USE OF CATEGORIES AND GROUPS OF EVIDENCE

Categories	Number of Decisions	Percentage of Total Decisions (N=3,337)
2: Falsity Equals Deception	2,236	67.0%
1: Deception Per Se	831	24.9
5: Consumer Understanding/Preference	761	22.8
19: Consumer Testimony	194	5.8
7: Commission Precedents	86	2.6
12: Trade Testimony	83	2.5
8: Court Precedents	75	2.3
13: Expert Testimony	48	1.4
9: Dictionary Definitions	41	1.2
14: Respondent Testimony	41	1.2
6: Representation Itself	23	.7
3: Official Notice	22	.7
15: Miscellaneous Testimony	19	.6
4: Commission Expertise	19	.6
18: Actual Deception	16	.5
10: Trade Definitions	9	.3
22: Unidentified Surveys	7	.2
16: Other Federal Agencies	6	.2
20: Respondent Surveys	5	.2
21: Commission Surveys	5	.2
17: Documentary Evidence	5	.2
11: Trade Understanding	4	.1
Groups		
I: Internal Commission Evidence	3,160	94.7%
Group I only	2,910	87.2
II: Precedential Evidence	120	3.6

Table 1 (continued)

Groups	Number of Decisions	Percentage of Total Decisions (N=3,337)
III: External Non-Consumer Evidence	224	6.7%
IV: External Consumer Evidence	206	6.2
Group II or III or IV	427	12.8
Group III or IV	349	10.5

Table 2---PERCENTAGE OF USE OF CATEGORIES AND GROUPS OVER TIME

Categories and Groups	1916-54	1955-73	1970-73
I: Internal Commission Evidence	96.4%	84.7%	87.8%
Group I only	92.2	56.9	36.4
1: Deception Per Se	24.7	26.1	30.3
2: Falsity Equals Deception	68.3	59.0	60.6
5: Consumer Understanding/Preference	24.9	10.1	0.0
II: Precedential Evidence	1.0	19.1	18.2
III: External Non-Consumer	4.8	18.5	21.2
9: Dictionary Definitions	.7	4.4	0.0
12: Trade Testimony	2.0	5.5	0.0
13: Expert Testimony	.6	6.3	12.1
14: Respondent Testimony	.8	4.0	9.1
IV: External Consumer	3.6	21.7	54.5
19: Consumer Testimony	3.5	19.8	48.5
20: Respondent Surveys	.1	.6	6.0
21: Commission Surveys	.1	.4	3.0
22: Unidentified Surveys	0.0	.8	6.0
Group III or Group IV	6.8	32.8	63.6

54 and 1955-73, chosen because the figures for many of the categories and groups change notably at or near 1954-55. No advance prediction was made that this would occur, but a post hoc explanation is discussed below regarding a change in reporting procedures made by the Commission in 1954.

Table 2 shows that the use of Internal Commission Evidence, Group I, has decreased in 1955-73, and that use of both groups of external evidence has greatly increased. While use of Precedential Evidence has also increased sharply, no significance is placed on the fact because precedents must be established before they can be used.

Table 2 also shows data for selected categories which were either large for the entire 1916-73 period or showed significant change in 1955-73. The decrease in use of Group I thus is seen as due mostly to Category 5, while Category 2 declined only slightly and Category 1 actually increased in the later period. The other categories of Group I were used so infrequently that they show no indication of trends.

The two categories in Group II showed almost identical patterns of change, so are not listed.

The four Group III categories shown are the only ones in that group which appeared in more than one per cent of cases overall. Each showed strong increases in the later time period. While dictionary definitions participated in this increase, the data do not show them to be as prevalent as implied by Millstein[14] and Gellhorn.[15]

While all Group IV categories increased in 1955-73, the frequencies for three of them were so small that the bulk of the group's increase is readily attributed to Category 19, Consumer Testimony.

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14. Same reference as footnote 2, p. 476.

15. Same reference as footnote 3, p. 565.

To summarize the trends, there was an increase in external evidence, Groups III and IV, and a decrease of internal evidence, Group I. The significance of the Group I decrease may be appreciated not so much from a decline in its sheer usage but rather from the decline of 35.3 percentage points in the tendency to use it solely.

Table 2 also presents data for the 1970s to determine whether the trends established during 1955-73 may have been even more emphatic in most recent times. With the Nader and ABA reports on the FTC made available in 1969,[16] changes in Commission procedures might reasonably be hypothesized for the ensuing period. The data bear this out, with the incidence of usage of Group I only dropping to 36%, and the usage of Group IV increasing greatly.

Readers accustomed to examining the statistical significance of differences or trends should recall that the data reported here represent the entire population, not a sample, of the FTC decisions involved.

Reasons Behind the FTC's Use of Evidence

Why has the FTC relied so heavily on "internal" sources of evidence, and why has it shifted in recent times toward using "external" evidence?

Use of Internal Evidence

Probably the principal reason for the use of Internal Commission Evidence (Group I) is the basic tenet that an administrative agency is held to be a body of experts possessing among themselves the expertise

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16. Edward F. Cox, Robert C. Fellmuth, and John E. Schulz, Nader's Raiders: Report on the Federal Trade Commission (New York: Grove Press, 1969); Report of the American Bar Association Commission to Study the Federal Trade Commission (Washington: American Bar Association, 1969).

to make findings of fact. Not only may they make decisions on internal evidence only, but they no doubt fear that the principle of expertise would be threatened if they made decisions on external evidence only.

This probably explains why use of internal evidence has gone down only slightly while external evidence has gone up dramatically. As a recent FTC opinion states, "When [external] evidence is offered to assist the Commission in interpreting advertising representations, it supplements rather than supplants the Commission's expertise."[17] The second author has observed that in two presentations he has made as an expert witness in FTC cases the law judges have stated pointedly that they have used his testimony not to establish points directly but merely to corroborate their own similar judgments which they have made independently.[18] (One suspects the judge often formulates his opinion on the basis of outside testimony, yet maintains for reasons of propriety, with an eye on the commissioners' review of his decision, that he has made the determination on his own.)

The courts recognize and defer to the Commission's expertise. Millstein observes that they rarely reverse the FTC and only where it is "arbitrary or clearly wrong or not supported on the record as a whole by substantial evidence."[19] Since the courts are prone to affirm Group I evidence as being in their opinion "substantial," there is small likelihood that the Commission will be caught lacking in that requirement.

An example of court review was that of Double Eagle Industries,[20] in which respondent produced consumer testimony that certain labels

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17. Crown Central, Dkt. 8851, TRR par. 20,790 (1974).

18. Sun Oil, Dkt. 8889 (1974); Ford Motor, Dkt. 9001, decision pending.

19. Same reference as footnote 2, p. 470.

20. 66 FTC 1039 (1964).

were not deceptive. The commissioners determined otherwise, on their own expertise. On review, the court upheld the commissioners by saying other evidence was not necessary where the exhibits themselves demonstrated their capacity to deceive: "If the Commission can find deception without evidence that the public was deceived, we believe that it can make the same finding on the basis of its visual examination of exhibits though numerous members of the public have testified that they were not deceived."[21]

Pertinent to this and most cases is the FTC's need to argue only that there is a "capacity to deceive" rather than actual deception. Since capacity to deceive may exist prior to actual deception, the Commission is further persuaded to forget about the difficult task of showing actual effects on consumers.

Clearly, the obtaining of external evidence may lengthen the time and increase the cost of prosecutions. Since disputed sales representations may continue in use during litigation, there has been much pressure placed on the Commission to reduce the time a decision takes. Consumer spokesmen have been prominent in pressing this point, thus it is ironic that their efforts may inadvertently help persuade the Commission to continue relying heavily on internal evidence.

Rise of External Evidence

Despite such gloomy prognoses, the use of external evidence has risen. Probably a fundamental reason has been the more subtle forms of deception which the FTC has become desirous of controlling. Is it deceptive for Wonder Bread to claim it is high in nutrition when the claim is literally true yet might imply falsely that the quality is unique

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21. Double Eagle v. FTC, 360 F.2d 268, 270 (10th Cir., 1965).

to this one bread?[22] Does the name "Safety Champion" imply that a tire is perfectly safe, or that it is safer than other tires?[23] A Commission desiring to press such matters against stiff industry resistance, including respondents' own consumer surveys and consumer witnesses, is bound to become a Commission with a developing sensitivity toward the need for "real" evidence.

The most obvious types of deception probably become more likely over time to be settled by consent decree rather than adjudicated order. Certain principles become so well established that respondents eventually tend to concede that given situations automatically mean deception. Thus it is the more subtle cases which will now lead most often to the formalities of a hearing. Since it is also the more subtle cases which most clearly necessitate the obtaining of external evidence, it is possible the the increase in such evidence is due in large part to the increase in cases now settled by consent which would formerly have been litigated.

Apparently not a reason for the increase in external evidence is the involvement of television in recent FTC cases. Television advertising has been charged with being particularly subtle and manipulative, which suggests that better evidence should be required in order to control it. However, this study found only twelve cases involving television alone, apart from the confounding effects of other media. It is not a substantial enough record to meaningfully affect the data.

Another pressure toward using external evidence probably was a change in reporting procedures which the Commission adopted in 1954.

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22. ITT Continental Baking, Dkt. 8860, TRR 1970-73 par. 20464 (1973).

23. Firestone, 81 FTC 398 (1972); Firestone v. FTC, 481 F.2d 246 (6th Cir., 1973).

This policy decision[24] required that the hearing examiner must issue findings in every case and the Commission must write an opinion in every case. Further, the examiner must "abandon formal and legalistic 'findings' and adopt instead narrative and descriptive reports." As early as 1924 Henderson had complained about legalistic, non-informative reports, saying they did not provide any clues as to how the Commission reached its conclusions.[25] This possibly means that external evidence may have been introduced into some cases up to 1954 without being mentioned in the recorded decisions. It is clear, at any rate, that the trend toward greater use of external evidence appears most clearly in the years following 1954 (see Table 2).

A further reason for the rise of external evidence is the development in the 1970s of litigation over the use of corrective advertising. Since this is so severe a penalty for the advertiser, it is natural that the respondent will urge more strongly that the need for it be conclusively shown. The corrective remedy assumes a continuing damaging effect for an extended period after the consumer last sees the alleged misrepresentation. The idea of continuing damage presupposes damage in the first place, which in turn suggests a need to prove actual deception rather than just "capacity to deceive." Examination of corrective advertising cases shows that they have extensively utilized consumer evidence. There have, however, been only a few such cases.[26]

Similar reasoning applies to the FTC's newly-expanded authority to employ temporary injunctions against deceptive practices pending

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24. Annual Report of the Federal Trade Commission (1954), p. 3

25. Gerald C. Henderson, The Federal Trade Commission (New Haven: Yale University Press, 1924), pp. 334-35.

26. Same references as footnotes 18 (Sun Oil), 22, and 23; Listerine, to be supplied

adjudication.[27] Since the alleged misrepresentor has more to lose, it seems fair to argue that the evidence against him should be stronger.

While most of the factors discussed here relate to legal procedures, it is also possible that the increasing sophistication of research methods available for obtaining external evidence is a factor in its increase. This has not been mentioned in FTC decisions, but there should be little hesitation in assuming it would have an effect.

A final encouragement we can mention for the use of external evidence is the criticisms of internal evidence made by the many sources cited above. If their reports of the Commission's over-reliance on internal evidence now seem outdated, it is likely that they have been outdated by their own impact.

In any event, there is no doubt that the FTC's viewpoint toward external evidence is improved. In two 1973 decisions it indicated that its own expertise "does not preclude consideration of relevant and helpful evidence,"[28] and that "in cases where, as here, extrinsic evidence exists in the record, the Commission should take it into consideration."[29]

END

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27. Sec. 13, FTC Act, 15 U.S.C. 53, amended, P.L. 93-153, 87. Stat. 576 (1973).

28. Coca-Cola, Trr 1970-73 pars. 20,470, 20,393 (1973).

29. Same reference as footnote 22.